

BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROGER W. ARMSTRONG
Claimant

VS.

IBP, INC.

Respondent
Self-Insured

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Docket No. 179,373

ORDER

Respondent appeals from a February 26, 1996 Award by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument on July 18, 1996. Ernest L. Johnson has been appointed Member Pro Tem for this case in place of Appeals Board Member Gary M. Korte, who has recused himself from this proceeding.

APPEARANCES

Claimant appeared by his attorney, Robert A. Levy of Garden City, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Craig A. Posson of Dakota City, Nebraska.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The sole issue to be resolved on appeal is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs and arguments of the parties, the Appeals Board finds that the Award of the Administrative Law Judge should be modified.

Permanent partial disability benefits should be awarded based upon a work disability of 28 percent.

Respondent argues that claimant should not be entitled to a work disability over and above the stipulated functional impairment of 7 percent to the body as a whole. In support of its contention, respondent cites a provision of K.S.A. 1992 Supp. 44-510e which provides in pertinent part the following:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Claimant was earning \$264 per week at the time of his injury. Claimant earned in excess of this amount working 12 to 15 hours per day at the Coop Elevator in Kingsdown. In addition, respondent contends that claimant earned a comparable wage thereafter at Ford County Feed Yard and that claimant's vocational expert, Jerry Hardin, opined that claimant had the ability to earn \$240 per week. This \$240 weekly sum would represent 91 percent of claimant's stipulated average weekly wage at the time of his injury. This, according to respondent, meets the definition of "comparable" for purposes of the above-quoted statute.

Respondent's arguments fail on each count. First, the Coop Elevator job in Kingsdown paid \$5.75 per hour compared to the \$6.60 per hour claimant made working for respondent. According to claimant he worked 12 to 15 hours per day at the elevator. This would result in an average weekly wage in excess of the \$264 per week he earned working for respondent. However, claimant further testified that the job at the grain elevator in Kingsdown was a temporary light-duty job which was to last only during the harvest. Claimant worked there only one month. It would not be reasonable to expect claimant to sustain a schedule of working 12 to 15 hours per day. There was no indication that work was available where claimant could continue earning such wages beyond the harvest time and, in fact, he was terminated at the conclusion of the harvest. Furthermore, claimant's physical record discloses that claimant's physical condition and restrictions would not permit him to sustain such a work pace over an extended period of time or on a permanent basis. The Appeals Board does not find the temporary job to fall within the intent of the statute. Furthermore, even if we were to apply the presumption that if claimant's restrictions in this case would justify a finding that the presumption had been overcome.

With respect to the job at the Ford County Feed Yard, which claimant was performing at the time of his regular hearing testimony, the record does not establish that he was earning \$240 per week. Although he was earning \$6 per hour, claimant was not working a 40-hour work week. Perhaps the confusion in this regard stems from the pay stubs which were attached to the regular hearing transcript as claimant's Exhibit No. 1. They showed earnings based upon hours worked ranging from a low of 35.11 hours to a high of 69.63 hours. However, claimant testified that these pay stubs represented a two-week pay period. Claimant explained that although he was treated as a full-time employee for purposes of qualifying for insurance, he never worked a 40 hour work week due to his injury and restrictions. Although not specifically restricted from working 40 hours, claimant testified that the job at Ford County Feed Yard caused his back to be sore all the time

and he would have to limit his work. The record does not specifically reflect whether full-time work was available for claimant at Ford County Feed Yard within his restrictions.

Finally, with respect to the opinion of Jerry Hardin that claimant had the ability to earn at least \$240 per week, it appears that this was based upon misinformation as to the number of hours claimant was working. Furthermore, the fact that claimant may have the ability to earn a comparable wage does not invoke the presumption of no work disability. K.S.A. 1992 Supp. 44-510e provides for a presumption of no work disability if a worker "engages in" work for comparable wages, not where the worker simply retains the ability to earn a wage comparable to that which he was earning at the time of his injury. Furthermore, we cannot find from the evidence any indication that claimant was deliberately or wilfully avoiding work in order to not earn a comparable wage or to otherwise take advantage of the workers compensation system. To the contrary, claimant appeared to have actively searched for work and accepted what work was available within his restrictions. The fact that he did work 12 to 15 hours per day, working 5 and 6 days a week at the temporary grain elevator job attests to the claimant's motivation and desire to work.

In a similar vein, respondent contends the claimant should be precluded from receiving a work disability because he was returned to work following his injury in an accommodated position with respondent but from which he was ultimately terminated due to cause. The reasons given claimant for his termination were that he had an unacceptable number of absences from work and that he had falsified his job application. While claimant's absenteeism and error on the job application may have constituted cause for dismissal pursuant to the policies of respondent, we do not find them to rise to the level of a refusal to work. The Kansas Court of Appeals in the case of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), held that where a worker unreasonably refused to return to a comparable wage job within the worker's restrictions, the presumption of no work disability would be applied. Here claimant did not refuse accommodated work. He accepted and performed the light-duty job given him by respondent and worked in that job until he was terminated. Although he did have an excessive number of absences from his employment, the record shows that most, if not all, of these absences were excused. Many had to do with the residual effects of his work-related injury and the treatment he was receiving for that injury. Other absences pertained to his being subpoenaed to testify in court in Colorado, an obligation which he notified his employer of in advance and for which he was excused from work to attend. The alleged falsification of the employment application pertained to claimant's failure to mention a prior employer for which he had worked only a short time. According to claimant, he had not completed his training for that job nor had he performed the work for which he was hired by that employer. Claimant testified that he had simply forgotten about it at the time that he applied for his job with respondent. Furthermore, claimant testified that he had great difficulty with reading and writing and that someone else completed the job application for him. He then signed it without reading what had been written. As stated, we do not find the facts of this case rise to the level of a wilful refusal to work as contemplated by the Court of Appeals in Foulk. Accordingly, the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e does not apply.

The Administrative Law Judge awarded claimant permanent partial disability benefits based upon a 42 percent work disability. This percentage was arrived at by averaging a 9 percent

loss of ability to earn a comparable wage together with a 75 percent loss of ability to access the open labor market. The Administrative Law Judge followed the formula approved in the case of Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), and averaged the two prongs of the two-part test provided for in K.S.A. 1992 Supp. 44-510e(a). The only expert vocational testimony in the record regarding claimant's loss of wage earning ability is that given by Jerry Hardin. The parties do not dispute his 9 percent wage loss figure which compared claimant's average weekly wage, at the time of his injury, to the \$240 per week Mr. Hardin found the claimant retained the ability to earn. The 70 to 75 percent labor market loss testimony was based upon the restrictions imposed by Dr. Blake Veenis. Dr. Veenis was the only medical expert to testify in this case. However, Mr. Hardin was also asked to compare his restrictions to those which had been given previously by the treating physician, Dr. Pedro Murati. There was no objection to Dr. Veenis testifying about Dr. Murati's restrictions. Furthermore, there was no objection when Mr. Hardin was asked to give an opinion concerning claimant's labor market loss utilizing Dr. Murati's restrictions. In this regard Mr. Hardin gave two opinions. He opined claimant's labor market loss to be 20 percent assuming Dr. Murati only restricted the weights claimant was permitted to lift. He placed claimant's labor market loss at 50 to 55 percent if it were assumed that Dr. Murati would have also included the other restrictions recommended by Dr. Veenis with respect to bending, twisting, kneeling, squatting, climbing, crawling, sitting, and standing. However, the testimony of Dr. Veenis does not reflect that Dr. Murati imposed or recommended any restrictions beyond those pertaining to lifting. Accordingly, we find that Dr. Murati's restrictions of no lifting above 55 pounds occasionally and 25 pounds frequently would result in a 20 percent loss of labor market. This opinion should be averaged with the 70 to 75 percent labor market loss opinion using Dr. Veenis's restrictions. When the resulting labor market loss is then averaged with the 9 percent wage loss, a 28 percent work disability is the result.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the February 26, 1996 Award of Administrative Law Judge Jon L. Frobish should be, and is hereby, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Roger Armstrong, and against the respondent, IBP, Inc., a qualified self-insured, for an accidental injury which occurred June 2, 1993 and based upon an average weekly wage of \$264, for 17.57 weeks of temporary total disability compensation at the rate of \$176.01 per week or \$3,092.50 followed by 397.43 weeks at the rate of \$49.28 per week or \$19,585.35 for a 28% permanent partial general body disability, making a total award of \$22,677.85.

As of August 16, 1996, there is due and owing claimant 17.57 weeks of temporary total disability compensation at the rate of \$176.01 per week or \$3,092.50, followed by 149.72 weeks of permanent partial disability compensation at the rate of \$49.28 per week in the sum of \$7,378.20, for a total of \$10,470.70 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$12,207.15 is to be paid for 247.71 weeks at the rate of \$49.28 per week, until fully paid or further order of the Director.

All other orders and findings of the Administrative Law Judge are hereby adopted by the Appeals Board as if specifically set forth, to the extent they are not inconsistent with the findings and conclusions enumerated herein.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid directly as follows:

Underwood & Shane	
Transcript of preliminary hearing	\$136.00
Transcript of regular hearing	\$234.50
Ireland Court Reporting	
Deposition of Blake Veenis, M.D.	\$117.30
Deposition of Jerry Hardin	\$138.50

IT IS SO ORDERED.

Dated this ____ day of August, 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert A. Levy, Garden City, KS
 Craig A. Posson, Dakota City, NE
 Ernest L. Johnson, Kansas City, KS
 Jon L. Frobish, Administrative Law Judge
 Philip S. Harness, Director